Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

JOSE HELI-MEJIA,
Petitioner

VS.

THE UNITED STATES OF AMERICA
Respondent

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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29 pp

QUESTION PRESENTED

I. Whether the government's failure to disclose and produce evidence under both the Jencks Act and the Brady doctrine concerning the "star" prosecution witness denies a defendant the right of confrontation, due process of law, and a fair trial.

LIST OF PARTIES IN APPELLATE COURT

Jose Heli-Mejia,

Appellant,

United States of America,

Appellee

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REFERENCE TO OPINIONS OF LOWER COURT

The opinion of the Fifth Circuit Court of Appeals is reproduced in the appendix.

JURISDICTION

The Court of Appeals had appellate jurisdiction over the district court's final judgment in this criminal case, pursuant to 18 U.S.C. § 3742 and 28 U.S.C. § 1291. The panel's order was entered on May 18, 1994. See A-3. Consistent with this Honorable Court's Rule 13, this Petition is timely filed. This Court's jurisdiction in the instant case is based on 28 U.S.C. § 1254(1), and United States Supreme Court Rule 10.

CONSTITUTIONAL PROVISION AT ISSUE

1. The Due Process Clause of the Fifth Amendment to the United States Constitution states:

> "[N]or shall any person be deprived of . . . liberty . . . without due process of law."

2. The Confrontation Clause of the Sixth Amendment to the United States Constitution states:

> "In all criminal prosecutions, the accused shall . . . be confronted with the witnesses against him . . ."

STATUTORY PROVISIONS AT ISSUE

U.S.C.A. § 3500(b) (Demands for production of statements and reports of witnesses) provides

> "After a witness called by the United States has testified on

direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use."

STATEMENT OF THE CASE

The jurisdiction of the district court was invoked pursuant to the indictment filed in the United States district court for the Southern District of Texas, Houston, Division. References herein shall be made to the trial record, by the designation "R".

The Petitioner was indicted by a federal grand jury, charging him with conspiracy to distribute in excess of five (5) kilograms of cocaine and aiding and abetting the possession with intent to distribute in excess of five (5) kilograms of cocaine. The Petitioner entered a plea of not guilty to both counts, and proceeded to trial before a jury on April 13, 1992.

On July 11, 1990, Mark Normandy and Thomas Schrettner, special agents with the DEA, met with an informant named Robert

Lopez a/k/a Tito in California. (6R.26-28,7). Tito had come to California to pick up a load of cocaine, but was unsuccessful. (6R.29). On July 12, 1990, Tito contacted the Defendant, David Ramos, with the intent of arranging another transaction. Id.

After speaking with Ramos, Tito received a phone number of a contact person in California. (6R.30). The name of the contact person was Dario. (6R.32). On July 18, 1990, Dario picked up Tito at his hotel. (6R.38). Tito returned later in a minivan which was loaded with 250 kilos of cocaine. (6R.39-40). Tito later met with the agents who took custody of the cocaine. (6R.41). The cocaine was subsequently transported under Government control to Houston, Texas. (6R.73).

On July 20, 1990, after Tito had travelled to Houston, Schrettner

instructed him to contact the people he had been told to by those persons he dealt with in California. (6R.79). As a result of the phone calls made by Tito, he travelled to the Four Seasons Hotel to meet with an individual who he later identified as the Petitioner. Id. The Petitioner told Tito that transfer of the cocaine would occur the following morning on July 21st.

The meeting the next morning was to occur at a Fiesta store. (6R.83). From the Fiesta store, surveillance followed Tito and the Petitioner to West Oaks Mall. Id. They drove to the mall in a van which was provided to the informant, and upon arrival at the mall the Petitioner was dropped off. (6R.83).

Agent Schrettner then determined from Tito that he had been instructed to load the cocaine into the van and bring it back

to the mall. Id. After the van was loaded, Tito drove back to the mall where he parked the vehicle in the parking lot. (6R.84).

Shortly after the van had been left, it was observed departing the mall travelling in tandem with another vehicle, a silver Mercury Cougar. Id. At the instruction of the surveillance officers, the van was pulled over by a patrol unit shortly thereafter. (6R.86).

Theodore Cummings, a special agent with the DEA, testified that he took possession of the cocaine upon its arrival from California, and transported it to the Houston office. (6R.99). On July 20, 1990, he also met with the confidential informant Tito. (6R.100-101). The purpose of the meeting was to make arrangements to deliver the cocaine. (6R.101). The informant made several

phone calls including some to the Defendant David Ramos in Miami. (6R.102).

As a result of Tito calling Ramos, he received other calls including one that instructed him to go meet an individual at the Four Seasons Hotel. (6R.103-104). Tito travelled to the Four Seasons Hotel to attend the meeting. (6R.105). After the meeting, Tito informed Agent Cummings that it was agreed they would meet the following morning at a Fiesta store located at Blalock and Old Katy Road. (6R.107).

Surveillance was set up at the Fiesta the following morning. (6R.109). From that location, Cummings followed Tito and an older Latin male in a gray van to the West Oaks Mall. Id. Upon arrival at the mall, the Latin male got out of the van and entered the mall. (6R.110). Cummings testified that the Latin male was the

Petitioner Mejia. Id.

Tito took the van and met with agents at a warehouse in order to load it with the cocaine so that the delivery could be made. (6R.112). After loading the van the informant returned with it to West Oaks Mall. Id. At some point after returning the van loaded with cocaine, Cummings saw the van moving through the parking lot followed by a gray Mercury Cougar. (6R.114).

Cummings followed both vehicles in order to maintain surveillance. (6R.115). At one point the two vehicles proceeded in different directions with Cummings following the gray Cougar northbound on Highway 6. (6R.121). The driver of the cougar was later identified as William Nunez and the passenger as Liliana Nunez. Id. The driver of the van was identified as German Cruz. (6R.122).

DEA Agent Blanca Campos was part of the surveillance team set up at the Fiesta store. (11R.766-767). During the course of surveillance, agents observed the Petitioner, William Nunez, Liliana Nunez and German Cruz conversing at different times. (11R.770-819). Agent Campos subsequently observed the informant arrive and meet with the Petitioner. (11R.772). The Petitioner and the informant left in a gray van, which Nunez had previously been seen in. (11R.773). She followed the van to West Oaks Mall, (11R.775), and upon entering the mall observed the Petitioner, William Nunez, Liliana Nunez and German Cruz. (11R.776).

On July 20, 1990, DEA Agent William Owen was conducting surveillance at the bar on the third floor of the Four Seasons Hotel. (11R.715). He observed the informant Tito enter the bar and sit with

the Petitioner. Id.

On July 21, 1990, Owen was part of the surveillance set up at the Fiesta store. (11R.721). He followed the van containing the Petitioner and the informant as it left the store. (11R.722). The van was followed to West Oaks Mall. (11R.723). The Petitioner exited the van and entered the mall. (11R.724).

Owen remained in the parking lot conducting surveillance. (11R.725). During surveillance he observed a gray Cougar circling the parking lot, and later after the van had returned, both the van and the cougar were observed exiting the lot. (11R.726-728). The Petitioner was observed entering a taxicab and leaving West Oaks Mall. (11R.728). The taxicab was followed to its final destination, the Four Seasons Hotel. (11R.729).

Heli-Mejia was convicted by a jury for conspiracy to possess with intent to distribute cocaine, and aiding and abetting the possession with intent to distribute cocaine. Heli-Mejia was sentenced to 350 months confinement. Heli-Mejia challenged his conviction and sentence, contending that: (a) the evidence was insufficient to support the two counts of conviction; (b) the district court erred in admitting evidence of extraneous acts and the denial of a motion for mistrial; (c) the district court's denial of the request to see documents, records and statements pursuant to Jencks and Brady was erroneous; and (d) the district court erred in enhancing the offense level at sentencing by finding Petitioner was an "organizer" or "manager". The Fifth Circuit Court of Appeals affirmed both the conviction and

sentence.

ARGUMENT

I.

THE PETITIONER WAS DENIED DUE PROCESS OF LAW, AND THUS A FAIR TRIAL, DUE TO THE DISTRICT COURT'S DENIAL OF ACCESS TO THE OFFENSE IS CONTRARY TO DOCUMENTS AND RECORDS PERTAINING TO A GOVERNMENT WITNESS AND THE WITNESS' PRIOR GRAND JURY TESTIMONY

During the course of trial, counsel for Petitioner requested production of the complete payment records of a testifying Government informant, (7R.320), grand jury testimony of the witness and reports of investigating officer (10R.616-620), and the informant's file as it related to his testimony. (14R.1017). All such requests were denied with the documents requested placed under seal and made part of the record. The cumulative effect of denying Petitioner access to the requested items was to prevent his counsel from rendering effective assistance of counsel by

hampering his ability to confront and cross-examine the witness, and to deny Petitioner due process of law.

In reviewing the propriety of the district court's ruling, the Fifth Circuit found that the issue raised lacked sufficient legal substance to justify reversal of the conviction. Since this holding is contrary to established legal precedent, the holding is in conflict with decisions of both this Honorable Court and other Federal Circuit Courts of Appeals. See U.S. Supreme Court Rule 10.1(a) and (c).

Although the prosecutor is not required to disclose his entire file to defense counsel, he must disclose evidence to the accused that, if suppressed, would deprive the defendant a fair trial. United States v. Bagley, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985); United

States v. Agurs, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976).

A Government informant named Robert Lopez, a/k/a Tito, testified at trial against the Petitioner. Petitioner's request for the complete payment records was denied after an en camera inspection. At trial, Petitioner was furnished with only summaries of the payment records, however, the summary sheets were kept in an irregular manner with several payments recorded out of chronological order. (7R.322). Thus, Petitioner could not determine that the money was in fact paid to the informant and when it was paid. (7R.323).

Petitioner further requested production of certain reports prepared by investigating officers concerning the informant, due to his belief that said reports contained both Brady and Jencks

material (10R.620). Following an en camera inspection, the court refused to give Petitioner access to the reports, but rather placed them under seal for appellate review.

The informant was the "key" substantive witness against the Petitioner. It was critical to the Petitioner receiving a fair trial, that any and all exculpatory and impeachment evidence derived from the informant's activities be disclosed. See Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 91963); see also United States v. Bagley, supra.

Finally, at trial the informant testified that he had previously testified before a grand jury in Boston to matters related to the instant case. Petitioner requested under Jencks that this testimony be produced. After an en camera review,

the trial court denied the request in finding that the grand jury testimony was not inconsistent with any testimony elicited at trial. (10R.616).

The Jencks Act requires the Government to release to the defendant, after a witness' direct examination, any statement of the witness in their possession which relates to the subject matter of the witness' testimony. 18 U.S.C. § 3500(b). Specifically, Section 3500(e)(3) requires production of any statement made by a witness to a grand jury. The underlying purpose of the Jencks Act is to enable the defense to impeach a Government witness by prior incorrect statements or testimony.

It is important to note that the Government informant was the "key" witness against the Petitioner. Far ranging and effective cross-examination of this

informant was crucial to the Petitioner's defense. The district court's apparent restriction of Petitioner's cross-examination of the informant severely impaired his defense.

The Sixth Amendment guarantees the right of an accused to confront his accusers. See Davis v. Alaska, 415 U.S. 308, 94 St.Ct. 1105, 39 L.Ed.2d 347 (1974). A primary interest secured by the confrontation clause is the right of cross-examination. Id. The restrictions placed on Petitioner's cross-examination of the informant impeded his ability to question the informant's motives and bias, and to test his credibility.

Where the witness is the "star" Government witness, providing an essential link in the prosecution's case, the importance of full cross-examination to reveal possible bias is necessarily

increased. United States v. Summers, 598 F.2d 450 (5th Cir. 1979); see also United States v. Wesevich, 666 F.2d 984 (5th Cir. 1982). Thus, while restrictions on the scope of cross-examination are within the sound discretion of the trial judge, this discretionary authority to limit cross-examination comes into play only when there has been permitted, as a matter of right, sufficient cross-examination to satisfy the Sixth Amendment. Summers, supra at 460; Greene v. Wainwright, 634 F.2d 272 (5th Cir. 1981).

Where a witness or accomplice may have substantial reason to cooperate with the Government, it is especially important that a defendant on trial be able to explore and develop any agreement between the Government and the witness. Greene, 634 F.2d at 276. Whether or not such a deal existed is not crucial, rather what

counts is whether the witness may be shaping his testimony in an effort to please the prosecutor. Id.

The cumulative effect of the trial court's repeated denial of access to the requested documents and evidenced served to deny the Petitioner's ability to completely exercise his Sixth Amendment right of confrontation and his right to due process of law. This error is of constitutional dimension, thus it cannot be determined to be harmless error. For that reason a compelling basis exists for this Honorable Court to grant the instant Petition for Writ of Certiorari.

CONCLUSION

For the foregoing reason, the Petitioner respectfully submits that a compelling basis exists for this Honorable Court to grant this Petition for Writ of Certiorari, reverse the judgment of the Fifth Circuit Court of Appeals, and remand the case for a new trial.

Respectfully submitted,

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(2)

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IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-2631

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

GERMAN CRUZ, JOSE HELI-MEJIA
and DAVID RAMOS,

Defendants-Appellants.

Appeal from the United States
District Court for the
Southern District of Texas

(May 18, 1994)

Before KING, and WEINER, Circuit Judges, and DOHERTY[1], District Judge.

PER CURIAM:

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[1]District Judge of the Western District of Louisiana, sitting by designation.

Defendants-Appellants David Ramos, Jose Heli-Mejia, and German Cruz appeal their convictions for conspiracy to possess with intent to distribute cocaine in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(A), 846; and aiding and abetting the possession with intent to distribute cocaine in violation of 21 U.S.C. § 841(a)(1), (b)(1)(A), and 18 U.S.C. § 2. After carefully considering the facts and legal arguments advanced by counsel in their briefs to this court and in their oral arguments to this panel, and having reviewed the record from the district court, we conclude that the majority of the cited points of error[2] -- while not

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[2]Cruz, Ramos, and Heli-Mejia all challenge the sufficiency of the evidence. Cruz challenges the admission of certain inculpatory statements as violative of his Fifth and Sixth Amendment rights to counsel. Cruz also challenges the district court's refusal to declare a mistrial on the basis of testimony

necessarily frivolous -- lack sufficient factual and legal substance to justify reversal of Defendants-Appellants' convictions. Whether Cruz's right to counsel was violated, however, merits more discussion. We, therefore, confine our factual review and legal analysis in this opinion to that issue.

I.

FACTS AND PROCEEDINGS

Cruz was arrested by Drug Enforcement Administration (DEA) agents after an indictment was returned charging him with complicity in a cocaine conspiracy. Cruz

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elicited from a government agent on cross-examination. Ramos challenges the restriction of the scope of his cross-examination. Heli-Mejia challenges the denial of his requests for disclosure of evidence held by the government, and the district court's finding that he was a manager or supervisor of criminal activity for purposes of the sentencing guidelines. Both Ramos and Heli-Mejia challenge the admittance of evidence of extraneous acts.

was promptly given *Miranda*[3] warnings; however, as Cruz was not proficient in English, the agents employed Cruz's wife as an interpreter. Cruz had no questions and did not request an attorney. Cruz was taken to another location where several agents had left their vehicles. A Spanish-speaking officer then repeated the *Miranda* warnings in Spanish. Cruz was asked if he understood the warnings and replied that he did. Cruz was then asked if he had a lawyer. Cruz replied that he was a "working man" and "couldn't afford an attorney." The agents then proceeded to conduct a cursory interrogation. Shortly thereafter, Cruz was transported to the DEA field office and again was given *Miranda* warnings in Spanish. Cruz indicated that he understood his rights,

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[3]384 U.S. 436 (1966).

but he did not request counsel. DEA agents then questioned Cruz for twenty minutes. In response to their questions, Cruz gave several inculpatory statements to the agents.

Later that day, Cruz was arraigned, at which time he requested the appointment of counsel. With benefit of counsel, Cruz moved to suppress his inculpatory statements on the grounds that he had invoked his right to counsel when he stated that he was a "working man" and "couldn't afford an attorney." Cruz argued that, as he had not waived his right to counsel at any time after making those comments, his statements to the DEA agents should be suppressed as the product of improper questioning.[4] The district

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[4]Neither party disputes the words spoken by Cruz. The only dispute is the effect to be given to those words.

court rejected Cruz's motion, reasoning, in part, that Cruz's comments were not "a positive affirmation of the right to counsel." At trial, the government introduced the inculpatory statements into evidence. The jury convicted Cruz, and he timely filed a notice of appeal.

ANALYSIS

"An accused in custody, 'having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him,' unless he validly waives his earlier request for the assistance of counsel."[5] "If the interrogation continues without the

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[5]*Smith v. Illinois*, 469 U.S. 91, 94-95 (1984) (quoting *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981); *accord Miranda v. Arizona*, 384 U.S. 436, 474 (1966); *United States v. Cherry*, 733 F.2d 1124, 1130 (5th Cir. 1984).

presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the [accused] knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel."[6] "[A] valid waiver of the right cannot be established by showing only that [the accused] responded to further police-initiated custodial interrogation even if [the accused] has been advised of his rights."[7]

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[6]*Miranda*, 384 U.S. at 75.

[7]*Edwards*, 451 U.S. at 484; *see Smith*, 469 U.S. at 95 ("This 'rigid' prophylactic rule embodies two distinct inquiries. First, courts must determine whether the accused actually invoked his right to counsel. Second, if the accused invoked his right to counsel, courts may admit his responses to further questioning only on finding that he (a) initiated further discussions with the police, and (b) knowingly and intelligently waived the right he had invoked." (citations omitted).

Cruz contends that he invoked his right to counsel, thus rendering the fruits of subsequent questioning inadmissible, when he stated that he was a "working man" and "couldn't afford an attorney."[8] But "[t]he word 'attorney' has no talismanic qualities. A defendant does not invoke his right to counsel any time the word falls from his lips."[9]

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[8]Cruz had both a Fifth Amendment and Sixth Amendment right to counsel. The Fifth Amendment right to counsel arises when, as here, an individual is subject to custodial interrogation. *Edwards*, 451 U.S. at 482; *Miranda*, 384 U.S. at 470; *United States v. Berisha*, 925 F.2d 791, 797 (5th Cir. 1991). The Sixth Amendment right to counsel attaches upon the initiation of judicial proceedings against an individual. *See Michigan v. Jackson*, 475 U.S. 625, 629 (1986); *Brewer v. Williams*, 430 U.S. 387, 398 (1977). Cruz was under indictment at the time that he was questioned, so his Sixth Amendment right to counsel had attached. *See Patterson v. Illinois*, 487 U.S. 285, 290 (1988).

[9]*United States v. Jardina*, 747 F.2d 945, 949 (5th Cir. 1984); *cert. denied*, 470 U.S. 1058 (1985); *accord Thompson v. Wainwright*, 601 F.2d

Viewing Cruz's comments in context of the officer's question and giving his words their ordinary meaning, Cruz did not evince "a desire to deal with the police only though counsel."[10]

Given the officer's inquiry whether Cruz had a lawyer, his response could only be construed as a statement of fact -- equivalent to, "no, I don't have an attorney."[11] Cruz's response could not

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768, 772 (5th Cir. 1979); *Nash v. Estelle*, 597 F.2d 513, 519 (5th Cir.) (en banc), *cert. denied*, 444 U.S. 981 (1979).

[10]*Edwards*, 451 U.S. at 484. "[W]hile an accused is not required to use any magic language to invoke the right to counsel, we do not ignore the plain meaning of his words in order to find invocation of the right to counsel." *Griffin v. Lynaugh*, 823 F.2d 856, 863 n.3 (5th Cir. 1987), *cert. denied*, 484 U.S. 1079 (1988).

[11]Cruz contends his comments were made in response to the *Miranda* warnings; however, the uncontested testimony at the suppression hearing establishes that his comments were made in response to an inquiry whether he had a lawyer. Under

reasonably be construed as a request for counsel.[12] We are satisfied that, under the instant circumstances, Cruz did not evince a desire for counsel; and, as there is no suggestion that his subsequent statements were involuntary, we conclude that the district court did no err in denying the motion to suppress on the basis of Cruz's statement that he was a working man who could not afford an

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cross-examination, the officer giving the *Miranda* warnings testified: "Well, during when I was reading the Miranda warning to him, at that time I asked him if he had a lawyer, and he answered back that, no, he didn't have a lawyer." Later the officer clarified this testimony: "I remember him also telling me in Spanish when I asked him about if he had an attorney or whatever, and he said, 'No.' He said he was just a working man. He couldn't afford an attorney."

[12]A different case would have been presented had the officer asked Cruz whether he *wanted* a lawyer. Given such a context, Cruz's response would arguably have been an ambiguous or equivocal request. However, we are not presented with such facts.

attorney.

Cruz nevertheless argues in the alternative that his response was at least an ambiguous or equivocal request for counsel, thereby limiting further questioning to a clarification of his desires. In *United States v. Cherry*[13] we affirmed the principle that, when an accused expresses an ambiguous or equivocal request for counsel, further interrogation is limited to clarification of the accused's desires.[14] Here, though, we find no ambiguity or equivocation in Cruz's response: He had been asked not if he *wanted* a lawyer, but if he *had* one; and he answered that question in the negative.

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[13]733 F.2d 1124 (5th Cir. 1984).

[14]*See id.* at 1130-31; *accord Thompson v. Wainwright*, 601 F.2d 768, 771-72 (5th Cir. 1979); *Nash v. Estelle*, 597 F.2d 513, 517-18 (5th Cir. 1979) (en banc), *cert. denied*, 444 U.S. 981 (1979).

That answer can not be stretched to constitute an unresponsive request for counsel, even an ambiguous or equivocal one.

This case is thus unlike prior cases in which we found an equivocal or ambiguous request for counsel. For example, in *Cherry*, the accused stated, "Maybe I should talk to an attorney before I make a further statement," then added rhetorically, "Why should I not get an attorney?"[15] We found that, as the accused's statements suggested conflicting desires to talk to an attorney and to talk to the authorities, his utterances constituted a request, albeit an equivocal one.[16] Unlike the comments in *Cherry*,

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[15]*Cherry*, 733 F.2d at 1127.

[16]*See id.* at 1130. Likewise, in *Thompson v. Wainwright*, 601 F.2d at 769, and *Nash v. Estelle*, 597 F.2d at 516-17, the accused

though, Cruz's comments did not suggest a desire for counsel; to the contrary, they unambiguously and unequivocally stated a matter of fact. Hence, as Cruz's comments could not be construed as an ambiguous or equivocal request, subsequent questioning was not limited to mere clarification of his desires. Denial of the motion to suppress was not error.

III

CONCLUSION

Having found no reversible error as to any of the Defendants-Appellants' assignments of error, their convictions and sentences are in all respects AFFIRMED.

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expressed both a desire to talk to authorities and a desire to talk to an attorney.